No. 79-1144

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,

vs.

RADCLIFF MATERIALS, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF SAFEWAY STORES, INCORPORATED, IN SUPPORT OF RESPONDENTS

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On consent of all parties, Safeway Stores, Incorporated ("Safeway"), submits this brief amicus curiae in support of respondents.

INTEREST OF AMICUS CURIAE

The interest of Safeway in the disposition of the case before this Court, involving the propriety of creating a new right of contribution among alleged antitrust conspirators, arises from the filing of contribution claims against Safeway by Olson Farms, Inc. ("Olson"). Olson, which had previously been determined by a jury to have conspired to fix prices and monopolize in violation of sections 1 and 2 of the Sherman Act, asserted its contribution

claims in two separate actions in the District Court for the District of Utah.

In the first suit the Court of Appeals for the Tenth Circuit affirmed dismissal of an independent action initiated by Olson seeking contribution from Safeway.[1] Dismissal was on the ground that there is no right of contribution under the statutory scheme of the antitrust laws. In an unpublished decision of the same date, the Court of Appeals similarly affirmed dismissal of Olson's second action, a third-party complaint which also sought contribution from Safeway.[2] On December 27, 1979, the Court of Appeals granted Olson's petition for *en banc* rehearing of both decisions and the cases were reargued on September 15, 1980.

This Court's resolution of the instant case could have a significant impact on Safeway's rights in the cases now under *en banc* consideration in the Tenth Circuit. Because those cases present very different circumstances than the *Texas Industries* case, they illustrate the range of consequences that may be produced by any ruling recognizing a new right of antitrust contribution.

SUMMARY OF THE ARGUMENT

As illustrated by the first Tenth Circuit case in which Olson is seeking contribution from Safeway, a new right of Federal antitrust contribution could require separate and successive retrial of antitrust cases against contribution defendants who were not parties to the initial anti-

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[1] *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 CCH Trade Cases ¶ 62,995 (10 Cir. 1979).

[2] Slip Op. No. 78-1773, Nov. 8, 1979.

trust action, and who were therefore not bound by the original judgment. This would thrust on the Federal courts a whole new category of complex litigation not authorized by Congress.

In addition, as illustrated by the second *Olson* case, a new right to antitrust contribution could permit an antitrust defendant who had settled the original claims against it to assume the garb of a contribution plaintiff and then attempt—by trial of the same antitrust claims it had earlier settled—to obtain contribution toward its settlement.

A right of contribution in these circumstances would lead to unacceptable additional complication of already exceedingly complex litigation, would pose insuperable problems of administration for the Federal trial courts, and could seriously undermine the deterrent value and the effectiveness of the private treble-damage remedy.

ARGUMENT

The unacceptable consequences of creating a new right to antitrust contribution are illustrated by the facts of the pending actions against Safeway:

1. *Olson Farms, Inc. v. Safeway Stores, Incorporated, et al.* (D.Utah, Civ. No. C-75-104).

In 1971, egg producers in Utah commenced an antitrust treble-damage action against Olson and a codefendant, Oakdell Egg Farms. The producers alleged that defendants had conspired to depress the price of eggs in violation of sections 1 and 2 of the Sherman Act.[3] The jury

[3] *Cackling Acres, Inc. v. Olson Farms, Inc.* (D.Utah, Civ. No. C-296-71).

returned a verdict against Olson, later affirmed on appeal by the Court of Appeals for the Tenth Circuit (*Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10 Cir. 1976)). Safeway was not a party to the *Cackling Acres* case, it did not negotiate any pre-complaint or other settlement with the plaintiffs, and the jury verdict in *Cackling Acres* did *not* find that Safeway had violated the antitrust laws.[4]

The jury in the original antitrust action found that Olson had intentionally violated the antitrust laws. The trial court had instructed the jury that it could find Olson liable *only* if it determined that Olson had intentionally conspired to fix prices. The court instructed that "acceptance [of an agreement to restrain trade] must be conscious and intentional,"[5] and that "it must be shown that * * * the members [of the conspiracy] came to a mutual understanding to accomplish a common and unlawful plan."[6] As to the claim of conspiracy to monopolize, the court instructed that the *Cackling Acres* plaintiffs were required to prove that Olson had conspired "with the specific intent * * * to acquire or exercise monopoly power."[7]

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[4]In the subsequent contribution case, Olson's counsel admitted that "[w]e don't know whether they [the alleged contribution defendants, including Safeway] particularly were found to be conspirators" (R.T., June 6, 1975, p. 24). Just one month later a Federal grand jury indicted Olson and other egg dealers on charges of conspiracy to violate the antitrust laws. Once again Safeway was not named. Olson thereafter entered a plea of nolo contendere (CCH Trade Reg.Rep., U.S. Antitrust Cases 1970-1979, pp. 53,619-53,620).

[5]*Cackling Acres, Inc. v. Olson Farms, Inc.*, R.T., pp. 7366-7367.

[6]Ibid.

[7]Id., p. 7379; see also pp. 7383, 7387-7388.

After judgment was entered against it in the *Cackling Acres* case Olson commenced an independent action in the District of Utah against Safeway and others who had not been defendants in the initial antitrust action.[8] Olson asserted that it had a right of contribution or total indemnity against Safeway and the others.[9] Olson's claim for contribution was alleged to "arise under" the Federal antitrust laws, and was based on its contention that Safeway was "claimed" to be a conspirator with Olson in the underlying *Cackling Acres* case.

The district court dismissed Olson's action for contribution and indemnity, and the court of appeals affirmed.[10] Rehearing *en banc* was granted and the cases have been submitted on rehearing.

If this Court were to create a new right of antitrust contribution which could be asserted by intentional antitrust violators against third parties, as in the first *Olson* case, a whole new category of complex litigation—one that has not been authorized by Congress and would not otherwise exist—would be thrust on the Federal courts.

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[8]D. Utah, Civ. No. C-75-104.

[9]Olson brought its claim for contribution notwithstanding that over four-fifths of the damages for which Olson seeks contribution were assessed by the *Cackling Acres* jury under the section 2 conspiracy-to-monopolize count (*Cackling Acres, Inc. v. Olson Farms,* 1150-1153). Most of the contribution defendants were not even alleged to have been involved in that violation (*Cackling Acres, Inc. v. Olson Farms, Inc.*, R.T. p. 7378).

[10]*Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 CCH Trade Cases ¶ 62,995 (10 Cir. 1979).

The first *Olson* case illustrates the problem: Safeway was not a party to and did not participate in the original antitrust action. As a matter of due process of law it was therefore not bound by the judgment against Olson. Thus, before there could be any judgment of contribution against Safeway, a complete retrial of the original *Cackling Acres* antitrust case would be necessary.

At the retrial Olson, an adjudicated intentional antitrust violator, would step into the shoes of plaintiff. This would occur on hopelessly stale evidence almost fifteen years after the commencement of Olson's unlawful activities.

Even putting aside the subversion of the statute of limitations entailed in such a procedure, to permit unsuccessful antitrust defendants to assume the role of plaintiffs and retry their cases against new defendants not named in the original action (who, if they were unsuccessful, could sue still others for contribution in an endless chain) would produce an incalculable and unacceptable increase in the already substantial burden of antitrust litigation in the Federal courts.

2. *Cackling Acres, Inc., et al. v. Olson Farms, et al.* (D.Utah, Civ. No. C-75-472).

In November 1975, the egg producer plaintiffs in the original *Cackling Acres* antitrust case filed a "follow-on" treble-damage action alleging continuation of the initial conspiracy and seeking additional damages from Olson.[11] The complaint in this follow-on action again did not name Safeway as a defendant.

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[11] *Cackling Acres, Inc., et al. v. Olson Farms, Inc., et al.* (D. Utah, Civ. No. C-75-472).

This time Olson did not wait for judgment against it before seeking contribution. Instead, it filed cross-claims against the other defendants and a third-party complaint against Safeway. In its third-party complaint, Olson asked for contribution or total indemnity in the event Olson was ultimately found liable to the antitrust plaintiffs.

The district court again refused to create a right to antitrust contribution and dismissed Olson's cross-claims and third-party complaint. Olson then *settled* the follow-on action with the antitrust plaintiffs, with the result that the action against Olson was dismissed with prejudice and Olson avoided the ultimate determination of liability that had been contemplated in its cross-claims and third-party complaint. Nevertheless, Olson maintained before the Tenth Circuit that it was entitled to contribution from Safeway toward the Olson settlement, notwithstanding that the follow-on antitrust action against Olson had been dismissed in its entirety.

Olson's second contribution claim illustrates that a new Federal right of contribution would raise very substantial issues in the settlement context, in addition to those presented in the case now before this Court, including whether a settling antitrust violator may obtain contribution to offset its settlement.

A number of state statutes do not permit any contribution unless a joint judgment has been entered against the alleged tortfeasors (see generally Prosser, Torts (4th Ed. 1971) pp. 308-309; *Sabre Shipping Corporation v. American President Lines*, 298 F.Supp. 1339, 1343, n. 1 (S.D.N.Y. 1969)). In those jurisdictions which do, by statute, permit contribution in favor of a settling defendant in

negligence cases (there is no corresponding recognition of contribution in favor of intentional wrongdoers such as Olson), it is accepted that the settling defendant must step into plaintiff's shoes and *prove* with competent evidence both (i) that the settling defendant was in fact liable to the plaintiff, and (ii) that the asserted contribution defendants were jointly liable with it. As Prosser points out, in negligence cases "a compromiser must sustain the burden of proof * * * as to his own liability to the original plaintiff" and "[t]he contribution defendant must be a tortfeasor, and originally liable to the plaintiff" (Prosser, Torts, supra, p. 309; see *W. D. Rubright Co. v. International Harvester Co.,* 358 F.Supp. 1388, 1392 (W.D.Pa. 1973)).

Thus, to permit a right of contribution where no judgment of liability has ever been rendered and where the underlying antitrust action has been dismissed by the only antitrust plaintiffs that Congress has given standing to sue, would require the settling antitrust defendant to prosecute a full trial of the very antitrust action which the proper plaintiffs had earlier dismissed. Further, the district court would be required to determine whether the settlement released the alleged contribution defendants from liability to the plaintiffs, for if a settlement does not have that effect it is generally accepted that there can be no right of contribution.[12] Whether a release had

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[12]See, e.g., Uniform Contribution Among Tortfeasors Act (1955 Rev.) § 1(d); 1 Harper & James, Law of Torts (1956) § 10.2, p. 719; *Allbright Bros., Contractors v. Hull-Dobbs Co.,* 209 F.2d 103 (6 Cir. 1953) (Arkansas statute); *Brenham v. Southern Pacific Company,* 328 F.Supp. 119 (W.D.La. 1971) (Louisiana statute), affirmed 469 F.2d 1095 (5 Cir. 1972), certiorari denied 409 U.S. 1061 (1972).

that effect would be a matter of Federal law and would require an inquiry into the intent of the parties (*Zenith Radio Corp. v. Hazeltine Research,* 401 U.S. 321, 342-347 (1971)). Finally, Olson, to obtain contribution, would be required to establish after the fact that the amount of its settlement was "reasonable" (Prosser, Torts, supra, p. 309).

Obviously, if a right of contribution were recognized either in an independent action or in the circumstances of the *Cackling Acres* "follow-on" action, an enormous additional burden beyond that authorized or contemplated by section 4 of the Clayton Act would be imposed on litigants and the Federal courts.

CONCLUSION

For the reasons stated, this Court should decline to create a new right of contribution under the Federal antitrust laws.

Respectfully submitted,

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January 18, 1981